Case No. S242799

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIA C. MEZA,

Plaintiff/Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN HENRIQUES, and ANTHONY J. DIPIERO,

Defendants/Respondents.

On Certified Question from the
United States Court of Appeals for the Ninth Circuit
Pursuant to California Rule of Court 8.548
Ninth Circuit Case No. 15-16900

PETITIONER'S OPENING BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

The Petitioner, Julia C. Meza, is an individual residing in Redwood City, California. Ms. Meza does not have any corporate affiliations.

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STATEMENT OF ISSUES

Under § 98(a) of the California Code of Civil Procedure, must the affiant be physically located and personally available for service of process at the address provided in the declaration that is within 150 miles of the place of trial?[1]

1 *Meza v. Portfolio Recovery Assocs., LLC*, 860 F.3d 1218 (9th Cir. 2017).

INTRODUCTION

Although the case presented appears on its surface to be about the logistics of service of process, the deeper significance of the case is a question about the purpose of the court system and whom it is supposed to serve. As the Superior Court system has become less a tribunal to settle varied legal disputes and more part of the collection arm of the debt buying industry, some existential questions must be faced. Chief among these questions is to what extent (if at all) the court system should contort its rules to satisfy the business model of the debt buying industry. It is no small question. The Superior Court docket now consists almost exclusively of collection actions, the majority of which are brought by fewer than a dozen major entities. When coupled with continuing budget cuts which have led to a reduction in Court services, it cannot be ignored that the filing fees from these collection actions help to shore up the Court's budget.

The debt buying industry preys on a vulnerable Court system in the same way it preys on vulnerable consumers, using the former against the latter. The cornerstone of the industry's litigation model is bulk filing of lawsuits and the obtaining of default judgments. However, not every consumer rolls over and allows a default. Some consumers exercise their right to demand that debt buyers provide proof of the validity and amount of the debt, and litigate cases to trial. Regular trials do not fit smoothly into

the debt buyer litigation model based on bulk filing. Compared to the virtual conveyor belt of default judgments, trials are neither as cheap, nor as predictable, due in part to the need to secure competent witness testimony. In an effort to further streamline its collection litigation model, the debt buying industry has tried to get rid of testimony at trial altogether. This is achieved by exploiting a perceived loophole in California Code of Civil Procedure § 98. Section 98 is part of an article entitled "Economic Litigation For Limited Civil Cases," which was enacted to govern "low-stakes" cases.

Section 98 allows a witness to offer trial testimony by written declaration – an exception to the general rule against hearsay – if certain very specific conditions are met. Used correctly, Section 98 strikes a balance that benefits both sides of a low-stakes case. It allows the party needing witness testimony to potentially avoid costly witness fees and travel costs, as well as scheduling issues. Similarly, the party against whom the testimony will be offered retains her right to compel the attendance at trial of the witness for cross-examination, and is not required to travel more than 150 miles to subpoena the witness. Thus, for low-stakes – presumably local – cases, a judgment can be obtained in a cheaper way (*i.e.*, using a written declaration), but with very limited infringement on the adverse party's constitutional right to cross-examine her accuser.

Large national debt buyers pervert this process by submitting fill-in-the-blank declarations from distant – often out of state – declarants, whom the consumer defendant would have to go far beyond 150 miles to serve with a civil subpoena to attend trial. To facially pass muster, the debt buyers' declarations will state that the declarant can be served at the address of the debt buyer's (local) counsel. However, the only way to serve a trial subpoena on a non-party is by **personal** service. The debt buyers claim that if a notice is delivered to the local attorney, then the debt buyer will produce the witness at trial. This deviation from the plain language of Section 98 leaves the consumer defendant's right to compel the witness's attendance at trial subject to the benevolence of the debt buyer.

This litigation strategy is even more offensive in light of the fact that debt buyers could use a declaration from *any* declarant in a motion for summary judgment. Section 98 is not implicated by a motion for summary judgment, but another more cynical calculation is. Specifically, debt buyers would prefer not to pay the $500 filing fee required by California Government Code § 70617(d) for a motion for summary judgment. The Court should not encourage a strategy that helps debt buyers to clog the courts with litigation, while evading the true cost of litigation. This strategy sees the court system effectively subsidize the debt buying industry's collection activity. By using Section 98 declarations, debt buyers

are playing a numbers game – counting on the majority of consumers to simply not attempt to compel their witnesses to trial. The result is the debt buyer can obtain a judgment via declaration in a few minutes if the consumer does not give a notice. If the consumer calls the debt buyer's bluff, the debt buyer can move to continue the trial or even dismiss the case without prejudice. This often occurs, as the debt buyer had never truly intended or prepared to bring its witness to trial.

Being by nature concerned with low-stakes cases, Section 98 has rarely received appellate review. As the Ninth Circuit noted in its Order Certifying Question to the California Supreme Court, what little review has occurred has resulted in differing outcomes in different counties. Thus, it is appropriate for the Supreme Court to decide whether a declaration complies with Section 98 when the declarant is not physically located and personally available for service of process at the address provided in the declaration that is within 150 miles of the place of trial.

STATEMENT OF THE CASE

Defendants/Respondents, Portfolio Recovery Associates, LLC ("PRA"), Hunt & Henriques, Michael Scott Hunt, Janalie Ann Henriques, and Anthony J. Dipiero (collectively "Respondents"), failed to comply with California Code of Civil Procedure § 98, which provides, in relevant part:

A party may, in lieu of presenting direct testimony, offer the

> prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury. The prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony which authenticates documentary evidence. To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally thereto, the prepared testimony shall be received as evidence in the case, provided that either of the following applies:
>
> (a) A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.
>
> (b) The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition. (Exhibit "1")

Petitioner, Julia C. Meza, had a consumer credit account with Wells Fargo Bank, N.A., on which she eventually defaulted. The defaulted debt was "sold, assigned, or otherwise transferred" to PRA, which then placed the debt with law firm Hunt & Henriques ("H&H"), and its attorneys Hunt, Henriques, and DiPiero, for collection.

In November 2010, Respondents, seeking to collect the defaulted consumer debt from Meza, filed a state court collection lawsuit against Meza in San Mateo County. On April 11, 2014, Respondents mailed Meza a document titled "Declaration of Plaintiff [in the state court litigation] in Lieu of Personal Testimony at Trial (CPP § 98)" (the "Eyre Declaration").

The Eyre Declaration purportedly described Meza's unpaid credit account and was signed by PRA employee (and non-party to the state court action) Colby Eyre. The final paragraph of the Eyre Declaration states, "Pursuant to CCP § 98 this affiant is available for service of process: c/o Hunt & Henriques, 151 Bernal Road, Suite 8, San Jose, CA 95119 for a reasonable period of time, during the twenty days immediately prior to trial." The address provided was not Eyre's residential or work address; Eyre both works and resides more than 150 miles from the location of the trial courthouse. Thus, Eyre could not have been *personally* served in the relevant time period at an address within 150 miles of the San Mateo County Courthouse in Redwood City, California.

On August 27, 2014, Meza filed her First Amended Class Action Complaint in the United States District Court for the Northern District of California, San Jose Division, to address Respondents' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), stemming from Respondents' pattern and practice of using fraudulent declarations, like the Eyre Declaration, in collection lawsuits against California consumers. On April 27, 2015, Respondents filed a Motion for Summary Judgment, arguing that, for the purposes of California Code of Civil Procedure § 98, a declarant need not be physically present (so they can be personally served with a trial subpoena) within 150 miles of the

courthouse in which the declaration is submitted. After a full briefing, the District Court entered its its Order Granting Defendants' Motion for Summary Judgment ("the Summary Judgment Order"), holding that "the plain language of Section 98 supports [a] finding that the statute does not require the affiant to be physically present at the address provided on the declaration." Appellant Julia C. Meza's Excerpts of Record Volume 2 579:4-5).[2] The District Court further concluded that the interpretation of Section 98 set forth in the *Rocha* and *Rodgers* cases may be binding in Santa Clara and Ventura Counties respectively, but were not binding in San Mateo County. (ER Vol. 2 585:11-19). Because the District Court found that the Eyre Declaration was valid, the District Court (without analysis) also concluded that the Eyre Declaration does not contain any misrepresentation, and thus that Respondents necessarily did not violate the FDCPA by using the Eyre Declaration. (ER Vol. 2 585:20-23). On September 1, 2015, the District Court entered a Judgment in favor of Respondents (ER Vol. 2 587), pursuant to the Summary Judgment Order.

Meza appealed to the United States Court of Appeals for the Ninth Circuit, seeking reversal of the Summary Judgment Order. Meza also filed a Motion requesting that the Ninth Circuit certify the question of

2 References to the Excerpts of Record are hereinafter abbreviated as "ER."

interpretation of Section 98 to this Court, to which Respondents filed a Notice of Non-opposition. After briefing and oral argument, the Ninth Circuit subsequently issued an Order Certifying Question to the California Supreme Court on June 22, 2017.

STATEMENT OF FACTS

None of the facts are in dispute. (ER Vol. 2 571:16-17). Meza is a "consumer" within the meaning of 15 U.S.C. § 1692a(3). (ER Vol. 1 35:7-9). On a date unknown to Meza, she is alleged to have incurred a financial obligation, namely a consumer credit account issued by Wells Fargo Bank, N.A. ("the alleged debt"). (ER Vol. 1 38:3-4, Vol. 2 571:18-19). The alleged debt was incurred primarily for personal, family, or household purposes and is therefore a "debt" as that term is defined by 15 U.S.C. § 1692a(5). (ER Vol. 2 38:4-6). Sometime thereafter on a date unknown to Meza, the alleged debt was sold, assigned, or otherwise transferred from Wells Fargo Bank, N.A., to PRA. (ER Vol. 1 38:8-10, Vol. 2 571:19-20). Thereafter, the alleged debt was consigned, placed, or otherwise assigned to H&H by PRA for the purposes of collection from Meza. (ER Vol. 1 38:15-17, Vol. 2 571:21).

On or about November 22, 2010, Respondents filed a lawsuit against Meza in the Superior Court of California, San Mateo County, captioned *Portfolio Recovery Associates, LLC v. Julia Meza*, Case No. CLJ500834

(the "state court action") which sought to collect the defaulted consumer debt from Meza. (ER Vol. 1 38:19-22, Vol. 2 571:22-24). Thereafter, on or about April 11, 2014, Respondents sent a document titled Declaration of Plaintiff in Lieu of Personal Testimony at Trial (CCP § 98) (the "Eyre Declaration") directly to Meza. (ER Vol. 1 38:24-25, Vol. 1 47-50, Vol. 2 571:24-26). The Eyre Declaration states in relevant part as follows:

> Pursuant to CCP § 98 this affiant is available for service of process: c/o Hunt & Henriques, 151 Bernal Road, Suite 8, San Jose, CA 95119 for a reasonable period of time, during the twenty days immediately prior to trial.
> (ER Vol. 1 49).

Thereafter, at Respondents' request, on or about May 19, 2014, the Clerk of the Superior Court issued a Clerk's Notice of Court Trial which set the state court action for trial on July 23, 2014, at 9:00 a.m. (ER Vol. 1 39:14-20, Vol. 1 51). The Clerk's Notice of Court Trial set the "place of trial" to be the Hall of Justice and Records, 400 County Center, Redwood City, California 94063. (ER Vol. 1 51).

SUMMARY OF THE ARGUMENT

Declarations are hearsay Evidence, but Section 98 provides an exception to this general rule. The purpose of the "available for service" clause in Section 98 is to enable the party against whom a Section 98 Declaration is offered to compel the attendance of the declarant at trial for live testimony and cross-examination. A trial subpoena is the document

that Section 98 contemplates to be served on an affiant, such as Mr. Eyre, and a trial subpoena can only be served on an affiant personally. Thus, this Court must conclude that Respondents did not comply with Section 98 when they failed to provide an address that is within 150 miles of the place of trial where Mr. Eyre was available for *personal* service of process within the 20 days before trial, as there is no other way to have *compelled* Mr. Eyre to attend trial.

ARGUMENT

A. RESPONDENTS' DECLARANT WAS NOT "AVAILABLE FOR SERVICE WITHIN 150 MILES" OF THE COURTHOUSE IN THE STATE COURT ACTION, AS REQUIRED BY SECTION 98

When interpreting a statute, a court must give meaning to all of the statute's terms. The court's analysis must begin with the fundamental principle that "[t]he objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." *Fitch v. Select Products Co.*, 36 Cal. 4th 812, 818 (2005). To ascertain that intent, "we turn first to the words of the statute, giving them their usual and ordinary meaning." *Nolan v. City of Anaheim*, 33 Cal. 4th 335, 340 (2004). The statute's every word and clause should be given effect so that no part or provision is rendered meaningless or inoperative. *Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal. 4th

257, 274 (1995); *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 388 (1993). Whenever possible, no part should be rendered "useless or deprived of meaning." *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 478 (1979).

1. Declarations are Hearsay Evidence, but Section 98 Provides an Exception to this General Rule

This Court must interpret Section 98, a statutory exception to the general hearsay rule of Cal. Evidence Code § 1200, which provides that declarations are inadmissible at trial. "Exceptions to the general rule of a statute are to be strictly construed. In interpreting exceptions to the general statute courts include only those circumstances which are within the words and reason of the exception. . . . One seeking to be excluded from the sweep of the general statute must establish that the exception applies." *Barnes v. Chamberlain*, 147 Cal. App. 3d 762, 767 (Cal. App. 4th Dist. 1983) (citing *National City v. Fritz*, 33 Cal. 2d 635, 636 (1949) and 73 Am. Jur. 2d Statutes § 313).

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible." Cal. Evidence Code § 1200. (The word "statement" used in the definition of "hearsay evidence" is defined in Evidence Code § 225

as "oral or written verbal expression" or "nonverbal conduct . . . intended . . . as a substitute for oral or written verbal expression.") "Affidavits, of course, are hearsay evidence, and are objectionable on that basis." *Houghtaling v. Superior Court*, 17 Cal. App. 4th 1128, 1149 (Cal. App. 4th Dist. 1993). "It is well established . . . that declarations constitute hearsay and are inadmissible at trial, subject to specific statutory exceptions, unless the parties stipulate to the admission of the declarations or fail to enter a hearsay objection." *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1354 (2007), *citing* Evidence Code § 1200 *and Lacrabere v. Wise*, 141 Cal. 554, 556-557 (1904). Unless subject to a statutory exception, the Eyre Declaration submitted by Respondents in the state court action is pure hearsay and would have been inadmissible at a trial over Meza's objection.[3]

2. In Order to Overcome the General Prohibition Against Offering Hearsay Documents into Evidence, Section 98 Declarants Must Work or Reside Within 150 Miles of Trial

Code of Civil Procedure § 98 provides that a party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury, if either:

> (a) A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together ***with a***

3 Respondents dismissed the state court action without prejudice prior to trial.

> ***current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.***
>
> (b) The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition.
>
> The court shall determine whether the affidavit or declaration shall be read into the record in lieu of oral testimony or admitted as a documentary exhibit.[4]

Respondents' position is that the emphasized language above means that affiants/declarants[5] utilizing a Section 98 declaration need only identify any person or place of business that is willing to "accept service" for the relevant time period, regardless of where the declarant is located. This Court should, instead, follow the holdings of the Appellate Division of the California Superior Court in *Target National Bank v. Rocha*, 216 Cal. App. 4th Supp. 1 (Cal. Super. Ct. 2013), and *CACH LLC v. Rodgers*, 229 Cal. App. 4th Supp. 1 (Cal. Super. Ct. 2014) (which followed *Rocha*), that declarants must be physically located within 150 miles of the place of trial to be "available for service of process" for the purpose of Section 98. The Appellate Division's reasoning in *Rocha* was based on interpretation of the plain language of Section 98 and reviewing the legislative history thereof.

4 Emphasis added.

5 The terms "affiant" and "declarant" are used interchangeably herein; both refer to the declarant in a Section 98 declaration offered in lieu of personal testimony at trial.

Respondents concede that Section 98 was created, in large part, to reduce the costs associated with litigating in California Courts. (ER Vol. 1 73:4-7). That purpose is best served by reducing the cost of mandatory travel fees required by Cal. Gov. Code § 68093 to mileage for 150 miles traveled, or $30.00. (ER Vol. 1 80:2-5).

The Eyre Declaration states that Respondents' declarant, Colby Eyre, is "available for service of process: c/o Hunt & Henriques, 151 Bernal Road, Suite 8, San Jose, CA 95119 for a reasonable period of time, during the twenty days immediately prior to trial." (ER Vol. 1 49). Respondents do not contend that Mr. Eyre resides fewer than 150 miles from the Redwood City courthouse where the state court action was pending, or that Mr. Eyre maintains an office at H&H's Bernal Road address.[6] Respondents do not contend at all that Mr. Eyre was ever physically available at H&H's Bernal Road address for ***personal*** service. Rather, Respondents contended that it is immaterial where Mr. Eyre actually resided or worked in the 20 days prior to trial. Respondents argue that having *anyone* within 150 miles of the courthouse where the state court action was pending who was willing to "accept service" for Mr. Eyre is sufficient to satisfy the "available for service of process" clause of Section 98. (ER Vol. 1 85:9-12). Respondents

6 H&H's Bernal Road office is within 150 miles of the Redwood City courthouse.

have misinterpreted Section 98.

Simply providing *any* "address for service of process," regardless of where the declarant resides, fails to comply with the statute. The address provided must be a "current address" ***of the declarant***, and that address must be within 150 miles of the place of trial. Despite their admitted knowledge of the holding in *Rocha*, Respondents attempted, and continue to attempt, to circumvent this statutory provision. Respondents' position disregards that Section 98 must contemplate service of a trial subpoena in order to compel Mr. Eyre to attend trial. A trial subpoena could *only* be personally served on Mr. Eyre. Under the facts of this case, Respondents cannot show that their declarant was available for "service of process" within the meaning of Section 98.

3. Section 98 Contemplates Service of a Subpoena on Mr. Eyre, and Subpoenas Must be Personally Served

Section 98 states that the declarant must be "available for service of process . . . during the 20 days immediately prior to trial." It is inarguable that the purpose of the "available for service of process . . . during the 20 days immediately prior to trial" clause of Section 98 is to enable the party against whom the Section 98 declaration is being offered to compel the declarant to attend trial. The crux of this case is exactly *how* that should occur. Section 98 does *not* state that a declarant must be available for

service of process "care of" his employer's attorneys of record. Meza contends, and some California Appellate courts agree, that this statutory provision contemplates service of a Civil Subpoena for Personal Appearance at Trial or Hearing on a declarant such as Mr. Eyre. *See* Judicial Council of California, Form SUBP-001, (ER Vol. 2 522-23). "The process by which the attendance of a witness is required is the subpoena." Cal. Code of Civil Procedure § 1985. Respondents, by conspicuously avoiding stating which specific document would require "service of process" within 20 days of trial, suggest that it is not a subpoena because the declarant need not be physically located at the address. (ER Vol. 1 77:25-28). However, service of a summons makes no sense in this context. Likewise, service of a Deposition Subpoena For Personal Appearance, *see* Judicial Council of California, Form SUBP-015, (ER Vol. 2 533-34), cannot be contemplated as the deadline for completing discovery requires any deposition to be begun at least 30 days prior to trial. Cal. Code of Civil Procedure §§ 2024.010 and 2024.020(a). Thus, Section 98 ***must*** contemplate a Civil Subpoena for Personal Appearance at Trial or Hearing on Mr. Eyre, as that is the only document which may be served on a non-party trial witness within 20 days of trial.

Because Section 98 contemplates service of a Civil Subpoena for Personal Appearance at Trial or Hearing on Mr. Eyre, personal service on

Mr. Eyre is *required*. *See, e.g.*, *Rocha*, 216 Cal. App. 4th Supp. at 7 ("While the Legislature has provided many different modes of serving summons, only one mode, personal delivery, is available for serving a subpoena.") (citing Cal. Code of Civil Procedure § 1987). Therefore, the affiant must be physically present at the address provided. While the declarant in the state court action, Mr. Eyre, stated that he was "available for service of process" at the address provided, Mr. Eyre was not physically available at that address for ***personal*** service of process. As discussed below, Mr. Eyre was not a party to the state court action. "Thus, the only way for [Meza] to compel [Mr. Eyre]'s attendance was to personally serve [him] with a subpoena." *Id.* at 9.

"[T]he only statutes specifically regulating service of such subpoenas – Code of Civil Procedure sections 1987 and 1988 – provide for either personal service on the witness or service on a concealed witness, after court order, by breaking and entering." *In re Abrams*, 108 Cal. App. 3d 685, 689 (Cal. App. 4th Dist. 1980). While Code of Civil Procedure § 415.20 *et seq.*, provides alternate methods of serving a summons, including substitute service and service on authorized agents, there are no similar provisions for service of subpoenas. *Id.*

> In addition to the lack of express statutory authorization for serving witness subpoenas on agents, service of a subpoena differs from service of summons because the penalty for

> disobeying a subpoena may be much more serious than that for not responding to a summons, hence it is much more important to maximize the probability of notice to the contemner than to the usual defendant. Not answering a summons normally will produce a default judgment for the payment of money, which may sometimes be later set aside under Code of Civil Procedure section 473 or an analogous procedure. Nonresponse to a subpoena may result in money damages plus five days' imprisonment. The difference in possible consequences may help explain why the Legislature has provided many different modes of serving summons, but one, personal delivery, for serving a subpoena.
> *Id.* at 690.

While it it true that certain witnesses can be compelled to appear at trial by means other than personal service of a subpoena (*e.g.*, by use of a "written notice requesting the witness to attend before a court" pursuant to Cal. Civ. Proc. Code § 1987(b)), those are not the facts in this case. Cal. Civ. Proc. Code § 1987(b) provides as follows:

> In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person ....

Consistent with the foregoing, a "Notice to Attend" may compel the presence either of: (1) any party to the action; (2) an officer, director or managing agent of such party; or (3) any person for whose immediate benefit the action is maintained (*e.g.*, beneficiary of trust, assignor of claim

sued upon for collection). However, Mr. Eyre was not a party to the state court action, nor was he an officer, director or managing agent of such party, or a person for whose immediate benefit the action was maintained. As such, Meza could not have *compelled* Mr. Eyre's presence at trial with a "Notice to Appear" pursuant to Cal. Civ. Proc. Code § 1987(b). Respondents would like the Court to assume that Respondents would produce the declarant at trial if any form of service was attempted on the declarant's employer's attorneys. However, there is simply no legal authority for the proposition that, if Eyre in fact had authorized H&H to "accept service" of a trial subpoena on his behalf had Meza served H&H, the service would have been binding upon Eyre himself. Such a holding makes the consumer's right to *compel* the declarant's attendance at trial subject to the good graces of Respondents and other debt buyers.

Mr. Eyre is not a party to the state court action, nor any of the other categories of persons who may be *compelled* to attend trial with a "Notice to Appear." Mr. Eyre was thus not available for service of process at the address provided in the Eyre Declaration, and therefore the requirements of Code of Civil Procedure § 98 were not met. The only way for the Court to find for Respondents under the instant facts is to hold that the Legislature, in drafting Section 98, deliberately intended to change the rules regarding compelling attendance of non-parties at trial. However, there is nothing in

the statutory text, legislative history, or case law to suggest that in these low-stakes cases the Legislature intended to effectively abolish Cal. Civ. Proc. Code § 1985. Instead, it is far more reasonable for the Court to view the development of the text of Section 98 as inclusive, rather than exclusive.

4. Statutory Construction of Section 98 Supports Meza's Interpretation

Construction of Section 98 must begin with the text of the statute. "When construing a statute, a court's goal is to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law. Generally, the court first examines the statute's words, giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 567 (2007) (internal quotations and citations omitted). "When the statutory language is ambiguous, a court may consider the consequences of each possible construction and will reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity." *Id.*

The Court's analysis should begin with the threshold proposition that

live testimony of witnesses in the courtroom at trial is the preferred method of receiving evidence. Cal. Evidence Code §§ 711 and 1200; *Elkins*, 41 Cal. 4th at 1358-59. This method of receiving evidence allows the trier of fact to view the witness's demeanor and assess their credibility. Live testimony also affords the opposing party an opportunity to cross-examine the witness and test their personal knowledge and competence.

Next the Court must consider that there is but one method for ***compelling*** the presence of a non-party witness at trial – a subpoena. As discussed above, subpoenas must be *personally* served upon the witness's body to be effective. *See e.g., Chapman v. Superior Court*, 261 Cal. App. 2d 194, 198 (Cal. App. 2d Dist. 1968) ("there can be no doubt that a person who is not 'duly served' with a subpoena cannot be punished for contempt of court"). Moreover, neither a subpoena nor its Code of Civil Procedure § 1987(b) equivalent are valid when issued to a non-resident of California. *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London*, 34 Cal. App. 4th 554, 555 (Cal. App. 2d Dist. 1995).

The Court must then decide what the Legislature intended in Section 98 by requiring that affiants/declarants provide "a current address <u>of the affiant</u> that is within 150 miles of the place of trial" *and* that "the affiant is available for service of process <u>at that place</u> for a reasonable period of time, during the 20 days immediately prior to trial" (emphasis added). It seems

apparent from these interconnected requirements that the Legislature intended that Section 98 declarants such as Mr. Eyre be available for personal "service of process" at an address within 150 miles of the place of trial during the short period of time remaining before the case is called for trial. "A cardinal rule of construction is that every word in a statute is presumably intended to have some meaning and that a construction making some words surplusage is to be avoided." *Watkins v. Real Estate Comm'r*, 182 Cal. App. 2d 397, 400 (Cal. App. 1st Dist. 1960).

The Court then must consider what document could be "served" upon a Section 98 declarant such as Mr. Eyre in the 20 days before trial in a limited civil case. It seems apparent that a Civil Subpoena for Personal Appearance at Trial or Hearing is the document contemplated by the Legislature for "service of process" on Mr. Eyre by Section 98.

If this Court concludes that a Civil Subpoena for Personal Appearance at Trial or Hearing is the document contemplated for "service of process" on Mr. Eyre by Section 98 ***and*** subpoenas must be personally served on the body of a witness to be effective, this Court must then conclude that the Legislature intended that Section 98 declarants such as Mr. Eyre reside or work within 150 miles of the courthouse where the case is to be tried. Any other construction of Section 98 would render some of its provisions meaningless. "Where reasonably possible, we avoid statutory

constructions that render particular provisions superfluous or unnecessary." *Dix v. Superior Court*, 53 Cal. 3d 442, 459 (1991).

Respondents' proposed interpretation of Section 98 would upset the balance envisioned by the Legislature, by eliminating a party's *right* to compel the attendance of witnesses whose testimony is being offered against her – an important and constitutionally protected due process right. Without the 150 mile requirement of Section 98, defendants in California courts would be unable to *compel* distant and out-of-state declarants to attend trial for cross-examination on the basis of declarants' knowledge. "A person's right of cross-examination and confrontation of witnesses against him in noncriminal proceedings is a part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment to the federal Constitution, where there is involved a threat to life, liberty or property." *August v. Department of Motor Vehicles*, 264 Cal. App. 2d 52, 60 (Cal. App. 4th Dist. 1968). "A statute should be construed whenever possible so as to preserve its constitutionality." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387 (1987).

5. The Legislative History of Section 98 Supports Meza's Interpretation

From 1957 to 1980, Cal. Code of Civil Procedure § 1989 provided as follows:

> A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than one hundred fifty miles from his place of residence to the place of trial.

Thus, for over two decades a party could not require the attendance of a witness at trial unless the witness resided less than 150 miles from the courthouse or in the same county where the trial was being held.

In 1980, the Legislature amended Cal. Code of Civil Procedure § 1989 to provide as follows:

> A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance is less than five hundred miles from his place of residence to the place of trial.

Thereafter, a party could not require the attendance of a witness at trial unless the witness resided less than 500 miles from the courthouse, or in the same county where the trial was being held.

In 1981, the Legislature amended Code of Civil Procedure § 1989 to its current form which provides as follows:

> A witness, including a witness specified in subdivision (b) of Section 1987, is not obliged to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service.

When the Legislature enacted Section 98 in 1982, a subpoenaed witness could be required to travel anywhere in the state for their personal appearance at a trial. This is still the case today. "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the

time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." *People v. Overstreet*, 42 Cal.3d 891, 897 (1986).

Before the present language of Section 98 was adopted, affiants from anywhere in the state would have been allowed to submit their trial testimony via affidavit. It is unlikely that the Legislature intended to tip the "cost saving" balance in favor of distant affiants, since the enacted language has exactly the opposite effect. Thus, the Legislature must have intended to tip the "cost saving" balance in favor of parties against whom trial affidavits would be used. Thus the more appropriate reading of Legislative intent would be: ***a party against whom a Section 98 affidavit will be offered at trial can be required to travel no more than 150 miles to serve a Subpoena requiring the personal attendance of the affiant.*** In this way the Legislature has struck a balance between the litigation costs saved by parties who wish to submit Section 98 affidavits at trial, and the additional costs incurred by parties against whom such affidavits are offered in serving Subpoenas. The Court should not contravene the Legislature and upset this balance.

B. RESPONDENTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO CHEAP "TRIALS BY DECLARATION"

Respondents revealed their true concern in previous briefing by

invoking the specter of "constitutional issues" that would arise should the Court enforce Section 98 as it was intended to be. The Court should expect similar arguments from Respondents and debt buying industry *amici curiae* here as well. According to Respondents, their efforts to recover Meza's unpaid balance through litigation is protected by the First Amendment's right to petition. Respondents apparently confuse the right to petition with the right to petition ***cheaply in bulk***. Respondents' real issue is that their streamlined (and lucrative) process of "conveyor-belt" collection litigation, fueled by "trials by declaration," would be impacted by proper enforcement of Section 98. Leaving aside that the First Amendment does not explicitly guarantee a right to use the courts for collection of defaulted consumer debt, any implication that Respondents would lose the right to petition the Courts is false. Respondents would simply have to litigate within the bounds of the law, even if it sometimes cost them more money to do so.

For example, Respondents, knowing that Mr. Eyre did not reside or work within 150 miles of the place of trial, could have eschewed serving the offending declaration and simply chosen to bring Mr. Eyre to trial to testify. Respondents instead chose to submit a defective Section 98 declaration, in the hope that Meza would be duped into believing the declaration is valid. This game is akin to debt collectors in the past filing speculative lawsuits on time-barred debts, in the hope that at least some

consumer defendants would unwittingly waive the affirmative defense. More generally, Respondents could choose to bring suits where their affiant had an address within 150 miles of the place of trial.

This case impacts California lawsuits, so presumably Respondents' litigation strategies in other states would be unaffected. Respondents' attempt to optimize their bulk filing of lawsuits contravenes both the letter and spirit of Section 98, but does not raise "constitutional issues." That Respondents file cases in bulk should not grant them a litigation advantage over other out-of-state litigants who follow the law. If "constitutional issues" would not arise for an out-of-state litigant who files a single low-stakes collection case in California, then neither should they arise because Respondents file many such cases.

Moreover, as noted in the Introduction above, Respondents and other debt buyers could simply move for summary judgment in collection cases where they wish to use a declaration from a distant affiant and do not wish to bring the affiant to testify at trial. Section 98 and the 150-mile limitation would no longer be a concern, and debt buyers might obtain judgments even sooner than if a case proceeded all the way to trial. Debt buyers could even benefit from scheduling multiple such motions on convenient dates, without having to worry about travel scheduling and costs for witnesses. Yet debt buyers by and large have not adopted this litigation model. It is

reasonable to assume that debt buyers have declined to streamline their litigation in this way because the debt buyer would have to pay more money up front, in the form of a $500 filing fee for each summary judgment motion. The debt buyer could recover the filing fee as part of the judgment if the debt buyer prevails, and the court system would receive revenue more commensurate with debt buyers' extensive use of judicial resources. The misuse of Section 98 this case addresses is a thinly-disguised way for the debt buyer to get the benefits of summary judgment, *i.e.*, testimony by declaration, while depriving the court of the filing fee. Given the risk that some judgments may end up uncollectible, debt buyers prefer to have as little skin in the game as possible, and pass this risk on to the court system and the public that the court system was instituted to serve.

There is nothing in the legislative history, cited exhaustively by Respondents in previous briefing, which would show that the Economic Litigation Project was concerned with assisting large national debt buyers to file bulk lawsuits cheaply. Respondents' real aim is merely to continue avoiding the true cost of litigation. Any such subsidy of the debt buying industry's business model harms both the court system and consumers. The Court is simply not charged with protecting Respondents' business model, especially if doing so entails defying the intent of the Legislature.

CONCLUSION

The purpose of the "available for service" clause in Section 98 is to enable the party against whom a Section 98 Declaration is offered to compel the attendance of the declarant at trial, for live testimony and cross-examination. If a trial subpoena is the document that Section 98 contemplates to be served on Respondents' affiant, Mr. Eyre, and a trial subpoena could only be served on Mr. Eyre personally, then this Court must conclude that a Section 98 declarant must provide an address that is within 150 miles of the place of trial, and where that declarant is available for *personal* service of process in the 20 days before trial.

Respectfully submitted,

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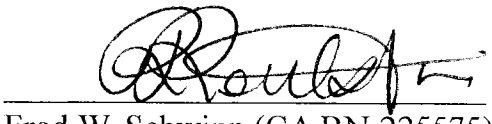
CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,030 words as counted by LibreOffice 5.3.2.2, the word processing system used to prepare the motion, exclusive of the certificates, tables and cover.

Respectfully submitted,



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PROOF OF SERVICE

I, Raeon R. Roulston, declare that:

I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to this action. My business address is 12 South First Street, Suite 1014, San Jose, California 95113-2418. I am employed in Santa Clara County, California.

On October 23, 2017, I served the following:

PETITIONER'S OPENING BRIEF ON THE MERITS

via overnight delivery, addressed as follows:

One copy to:
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
(415) 865-7000
Supreme Court

and via first-class mail, addressed as follows:

One copy to:
Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526
Court of Appeals

One copy to:
The Honorable Lucy H. Koh
280 South 1st Street
Courtroom 8, 4th Floor
San Jose, CA 95113
District Court Judge

One copy to:
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Simmonds & Narita, LLP
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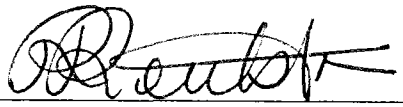
Attorney for Respondents

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed October 23, 2017, at San Jose, California.



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